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DEBT LITIGATION

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Debt Litigation is a comprehensive work dealing with default and summary judgments relating to debtor-creditor law and practice. It includes annotations and commentary on topics such as the fiduciary duties of solicitors, including negligence and conflict of interest, spoliation of evidence and e-discovery and conventional mortgages and guarantees.

What's New in This Update

The author has added new commentary and case law regarding solicitors, lender liability, settlement, enforcement, fraudulent conveyances, bankruptcy. Notable cases are summarized below.

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Highlights

Third party applications to remove counsel must of necessity be rare since the court's ability to remove counsel is very limited in such circumstances. Where the lawyer in question is actually a party defendant, they may be tempted to prefer their own interests over those of the other defendants or over their duties to the court. This conflicts with the lawyer's duty to the court to maintain the integrity of the judicial process and the other defendants may not waive such a conflict of interest: *Samadi v. Sayari*, 2024 BCSC 1353 (B.C. S.C.) [Solicitors 7:2]

The principles governing accessory liability are listed in *Lifestyle Equities CV v. Ahmad*, [2024] UKSC 17:

1. A person who knowingly procures another to commit an actionable wrong is jointly liable with the wrongdoer pursuant to the doctrine of accessory liability.
2. If the primary wrong is a breach of contract, the accessory liability is treated as a distinct tort.
3. If the primary wrong is a tort the procurer is jointly liable for the tort committed by the primary wrongdoer.
4. A person who assists another in committing a tort is jointly liable if the assistance is significant and given under a common design. Both principles can apply in a case, but assistance alone does not lead to liability unless it is part of a common design.
5. For accessory liability to be imposed, the person must have knowledge of the essential features of the tort. [Lender Liability 8:30]

In *L & S Accounting Firm Umbrella Ltd. v. Oronsaye & Ors*, [2024] EWHC 1919 (Ch) it is acknowledged that a knowing recipient may be found to have acted dishonestly but that this has never been a prerequisite of liability for knowing receipt. The recipient's knowledge must render it unconscionable for them to retain the benefit of the receipt. Thus, as held in *Manolete Partners PLC v. Freed & Ors (Re Just Recruit Group Ltd.-Insolvency Act 1986)*, [2024] EWHC 2242 (Ch) a third party can be held personally liable for knowing receipt if they receive property due to a director's breach of duty. Three conditions must be met:

1. The company disposed of assets in breach of fiduciary duty.
2. The defendant beneficially received assets traceable to the company's assets.
3. The defendant knew the assets were linked to a breach

of fiduciary duty. [Lender Liability 8:30]

Legal professional (solicitor and client) privilege is an absolute right, meaning it cannot be overridden by competing interests in disclosure. It is considered a fundamental human right. The "iniquity exception" arises when a document is related to fraud, crime, or other wrongful conduct, including any actions that breach good faith, public policy, or justice. This exception applies regardless of whether the lawyer is aware of or involved in the wrongdoing. The iniquity can be that of the client or a third party using the client. It does not apply just because a solicitor is involved in litigation where the client knowingly provides false information. The key factor is whether the iniquity goes beyond the normal scope of professional engagement or abuses the relationship within its ordinary course. The threshold for determining iniquity that prevents legal professional privilege is a *prima facie* case; it must appear more likely than not, based on available material, that iniquity exists. This applies equally in interlocutory contexts, regardless of whether iniquity is an issue in the proceedings (with possible exceptions for exceptional circumstances). When there is a *prima facie* case of iniquity, there will be no privilege and this includes documents that report or reveal iniquitous conduct and those prepared in anticipation of it: *East-West United Bank SA v. Gusinski & Ors*, [2024] EWHC 2223 (Ch), citing *Al Sadeq v. Dechert LLP and others*, [2024] EWCA Civ 28. [Lender Liability 8:28]

Carl v. Hawkins & Ors, [2024] EWHC 2186 (Ch) observes that there are three requirements for a claim in dishonest assistance:

1. a breach of trust or fiduciary duty by the primary wrongdoer(s);
2. the defendant must have assisted the primary wrongdoer(s) in the breach; and
3. the defendant must have had a dishonest state of mind.

Liability for dishonest assistance can be established even if the person concerned is not involved in the original misconduct—even third parties who assist in "the continuing diversion of the money" (*Twinsectra v. Yardley*, [2002] UKHL 12) are liable if the other conditions are satisfied and there is a link between the original misconduct and the assistance. This means that third parties who help with onward dispersion of the proceeds of fraud may be liable. [Lender Liability 8:30]

Although entirety of agreement clauses cannot prevent the court from considering the relevant factual matrix, such clauses manifest the objective intent of the parties to exclude evidence

of prior agreements and written or oral representations and this is why they are given meaning as embodying this objective intent with respect to the finality and certainty of the written agreement: *Alderbridge Way GP Ltd. (Re)*, 2024 BCSC 1433 (B.C. S.C.). [Settlement 9:6]

The failure to disclose a "tentative" agreement with a non-party for seven months does not furnish grounds upon which to stay the proceeding as an abuse of process as this is not an enforceable settlement. It does not change the litigation landscape and therefor does not require immediate disclosure: *Missal v. York Condominium Corporation No. 504*, 2023 A.C.W.S. 6694, 2023 ONSC 4908, 2023 CarswellOnt 20668 (Ont. S.C.J.) [Settlement 9:7]

See *Yurkovich et al. v. Citibank Canada et al.*, 2024 ONSC 4340 (Ont. S.C.J. [Commercial List]) for this analysis—*Pierringer* agreements are an important tool in settling multi-party litigation and contribute to the administration of justice by encouraging settlement between parties. The effect of the settlement agreement is to limit the liability of the non-settling party to its several liability as would be the case for multiple defendants sued by a plaintiff. A court may decline to approve a *Pierringer* agreement where the opposing defendant can establish "just and substantive cause" in the sense of prejudice that outweighs the policy goals in favour of settlement. Courts routinely impose conditions when approving *Pierringer* agreements where the partial settlement with the settling defendant may adversely create procedural unfairness for the non-settling defendant, the court may make orders to ensure the fairness of the trial, including allowing remaining parties to cross-examine the settling defendant. [Settlement 9:7]

The Court of Appeal for Ontario in *Kingdom Construction Limited v. Perma Pipe Inc.*, 2023 ONSC 4776 (Ont. S.C.J.) has observed, that where claims are fundamentally distinct from a party's claims against the non-settling defendants, this distinction weighs against the settlement being found to have changed entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation:

> The appellants have not identified an error in this conclusion, which was an important plank supporting the motion judge's view that the settlement of those fundamentally distinct claims did not change the entirety of the litigation landscape in a way that significantly altered its dynamics. The appellants have not identified how the settlement could possibly affect their strategy, or the evidence they may lead or will be faced with, in litigating the claims against them now that fundamentally distinct claims

> against others have been settled. These kind of potential effects of a settlement can be important markers that the litigation has changed in a significant way and therefore must be disclosed to avoid parties, and the court, "flying blind"...

It does not automatically affect a landscape change that a party changes its position from that set out in its pleadings. That multiple other defendants agree to declare one defendant to not be a proper defendant is not automatically grounds for pleadings to be dismissed: *Avedian v. Enbridge Gas Distribution*, 2024 A.C.W.S. 1892, 2024 ONSC 2376, 2024 CarswellOnt 6793 (Ont. S.C.J.) [Settlement 9:7]

To determine whether a document is a sham, one must consider both its creation and the parties' conduct. Evidence of deviating from the agreement doesn't make it a sham. A sham is a document created to mislead and does not reflect the parties' true intentions. The "Interfoto" principle states that even if a document is misrepresented, it can still be genuine if there's an actual agreement on it's the terms: *Lindsay v. O'Loughnane & Ors*, [2024] EWHC 2232 (KB) [Fraudulent Conveyances 11:6]

Section 71 of the *BIA* provides that when a bankruptcy order is made or an assignment is filed, the bankrupt immediately loses the capacity to deal with their property, which then vests in the trustee named in the order or assignment. Section 67(1) states that all property of the bankrupt at the date of bankruptcy or acquired before discharge is for the creditors' benefit. Once property vests in the trustee, it does not revert to the bankrupt upon discharge, and this includes any cause of action known to the bankrupt before discharge remains with the trustee. Allowing the bankrupt to pursue such actions would undermine the *BIA*'s purpose, as any recovery should benefit the creditors: *Debren v. Debren*, 2024 ONSC 3998 (Ont. S.C.J.) [Bankruptcy 12:11]